APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

10 March 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3340

ERIC BUCKLEY; DAVID W. MOWRY; DALE C. RATHFON, JR.; DAVID A. REICHENBACH; DENNIS L. REICHENBACH; JACOB WEAVER; DUANE L. WHITE; SANDRA L. WHITE,

Appellants,

v.

PHILIPS INDUSTRIES, INC., d/b/a Philips Products, Selinsgrove; TEAMSTERS LOCAL UNION NO. 764, International Brotherhood of Teamsters, AFL-CIO-CLC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 98-cv-00270)
District Judge: Honorable James F. McClure, Jr.

Submitted under Third Circuit LAR 34.1(a)
Thursday, March 9, 2000

Before: SCIRICA, ALDISERT and COWEN, Circuit Judges.

(Filed: March 10, 2000)

ORDER

It appearing that Eric Buckley; David W. Mowry; Dale C. Rathfon, Jr.; David A. Reichenbach; Dennis L. Reichenbach; Jacob Weaver; Duane L. White; Sandra L. White filed a complaint in the District Court alleging that their employer, Philips Industries, Inc., enforced Article IV of the Collective Bargaining Agreement, and

It appearing further that plaintiffs sought a declaratory judgment that Article IV is invalid and accordingly, Local 764 of the International Brotherhood of Teamsters, AFL-CIO, violated its duty of fair representation by negotiating, maintaining and enforcing Article IV and sought an injunction barring the operation of Article IV against them in the future and an order directing that the union refund all union dues paid by plaintiffs subsequent to their resignations from Local 764, and

It appearing further that the National Labor Relations Board, pursuant to a settlement agreement at Case 4-CB-8024, dated February 18, 1999 and March 4 & 5, 1999, ordered that Local 764 (1) may not threaten employees with loss of their employment for failing or refusing to remain union members, (2) may not refuse to accept resignations from the union, (3) may not represent that full union membership is a condition of employment at Philips Products, (4) must reduce fees from objecting nonmember employees, (5) must reimburse with interest all the named plaintiffs for any losses they may have suffered as a result of the union's failure to promptly reduce fees by a percentage attributable to non-chargeable expenses, and

It appearing further that the relief sought in the district court has already been obtained by the NLRB order,

IT IS HEREBY ORDERED AND ADJUDGED that the within appeal be and is hereby dismissed as moot.

By the Court

Ruggero J. Aldisert
Circuit Judge

Dated: March 10, 2000

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[1] *See, e.g., Wegscheid v. Local 2911*, 117 F.3d 986, 989 (7th Cir. 1997) (Posner, J.) (dismissing appeal as moot when named plaintiffs reached settlement with union which included assurances by union to these employees that they did not have to join the union or pay anything more than the agency fee).

APPENDIX B

DECISION AND ORDER, AND FINAL JUDGMENT
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

15 April 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERIC BUCKLEY, et al.,	:	
Plaintiffs	:	No. 4:CV-98-0270
	:	(Judge McClure)
v.	:	
	:	
PHILIPS INDUSTRIES, INC.,	:	**[DATE STAMP**
d/b/a PHILIPS PRODUCTS,	:	**OMITTED IN**
SELINS-GROVE, et al.,	:	**PRINTING]**
Defendants	:	

MEMORANDUM

April 15, 1999

BACKGROUND:

On February 18, 1998, plaintiffs commenced this action with the filing of a complaint alleging that defendants Philips Industries, Inc., d/b/a/ Philips Products, Selinsgrove (Philips), and Teamsters Local Union No. 764 International Brotherhood of Teamsters, AFL-CIO (Local 764), violated plaintiffs' rights under the National Labor Relations Act, 49 U.S.C. §§ 151 et seq. Plaintiffs are employees of Philips at its plant in Selinsgrove, Snyder County, Pennsylvania. Local 764 is the exclusive representative of a bargaining unit of Philips employees at the plant, including plaintiffs. Plaintiffs allege that defendants have

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[1] Plaintiffs are Eric Buckley, David W. Mowry, Dale C. Rathfon, Jr., David A. Reichenbach, Dennis L. Reichenbach, Jacob Weaver, Duane L. White, and Sandra L. White.

enforced an unlawful union membership provision of a collective bargaining agreement (CBA) between defendants.

Before the court are defendants' motions to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

DISCUSSION:

I. STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) admits the well pleaded allegations of the complaint, but denies their legal sufficiency. Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738, 740 (1976). The complaint must be construed in favor of the plaintiff with every doubt resolved in the plaintiff's favor. In re Arthur Treacher's Franchise Litigation, 92 F.R.D. 398, 422 (E.D. Pa. 1981). That is, the court must accept as true all factual allegations set forth in the complaint as well as all reasonable inferences that can be drawn from them. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court looks only to the facts alleged in the complaint and any attachments, without reference to any other parts of the record. Jordan at 1261. "[A] case should not be dismissed unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations." Id. (citing, inter alia, Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Whether a plaintiff will ultimately prevail is not a consideration for review of a motion under Rule 12(b)(6). Nami at 65.

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if the court lacks jurisdiction over the subject matter. Subject matter jurisdiction is the "[p]ower of a particular court to hear the type of case that is then before it," Black's Law Dictionary 854 (6th ed. 1990), as distinguished from in personam and in rem jurisdiction. A complaint should not be dismissed for lack of jurisdiction if it reveals any grounds for assertion of jurisdiction. Doran v. Lee, 287 F. Supp. 807, 813 (W.D. Pa. 1968). It is improper to dismiss a claim under Rule 12(b)(1) merely because the theories of recovery alleged probably are false. Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989) (citation omitted).

In this instance, defendants argue that jurisdiction over the subject matter of plaintiffs' complaint is vested in the National Labor Relations Board (NLRB). For the reasons which follow, we agree.

II. STATEMENT OF FACTS

According to the complaint, Local 764 and Philips are parties to a CBA covering the bargaining unit of employees at Philips' Selinsgrove plant, including plaintiffs. As relevant, the CBA provides:

> Section 1. All present employees who are members of the Local Union on the effective or execution date of this Agreement, whichever is the later, shall remain members of the Local Union in good standing as a condition of employment.
>
> Section 2. All present employees who are not members of the Local Union on such date, and all employees who are hired after such date, shall become and remain

members in good standing of the Local Union as a condition of their employment on and after the thirty-first (31st) day following the beginning of their employment, or on or after the thirty-first (31st) day following the effective or executive date of this Agreement, whichever is later.

Section 3. The failure of any person to become a member of the Union at the required time shall obligate the Employer, upon written notice from the Union to such effect, and to the further effect that Union membership was available to such person on the same terms and conditions uniformly available to other members, to forthwith discharge such person. Further, the failure of any person to maintain his Union membership in good standing as required herein shall, upon written notice to the Employer by the Union to such effect, obligate the Employer to discharge such person.

Section 4. The Union agrees that membership in the Union will be available to all on an equal basis without discrimination. The Company agrees that it will not interfere with the rights of any employee to become a member of the Union, and there will be no discrimination against any employee of the Company because of membership.

Section 5. The Company shall deduct from the first pay of each month the Union dues for the preceding month from all employees who have individually signed voluntary payroll deduction authorization cards and will promptly remit such money to the person duly designated in writing by the Union to receive such check-off funds on its behalf. Initiation fees shall be deducted in two equal monthly installments and promptly remitted in the same manner as Union dues.

> Section 6. The Union shall indemnify and same the Company harmless against any and all claims, demands, suits, or other forms of liability that may arise out of or by reason of action taken or not taken by the Company in reliance upon certified list furnished to the Company by the Union or for the purpose of complying with any of the provisions of this Article.

Complaint, Exhibit A at 3-5 (Art. IV of CBA).

On September 30, 1997, Jack L. Conner, Plant Manager for Philips, distributed to the employees at the Selinsgrove plant a memorandum which stated that employees could resign their union membership to work during a strike, thereby avoiding the risk of a union-imposed fine. The memo added:

> In the event an employee decides to resign his/her Union membership, the later the Company and Union agree to a union shop clause, the employee will either be allowed to rejoin the Union, or if the Union chooses not to accept the employee's offer to rejoin, then the employee will be allowed to work at Philips, just as if he/she were a member of the Union.

Complaint, Exhibit B.

Between October 22, 1997, and December 7, 1997, John F. Aderhold, Secretary-Treasurer and Business Representative for Local 764, sent to each plaintiff a letter stating:

> I want to explain to you, as I have to others, that you work under a contract with a specific Union Security Article. ...

> If you read the sections under Article IV - Union Security and Check-off, you will read that union membership is required to work at Philips Products. Pennsylvania is not a right-to-work state, nor are you a public sector employee - who is afforded certain rights by PLRB. Also, we have no agency shop language at Philips.
>
> I would not like to see you leave Philips because you don't want to abide by contractual language. Please understand the ramifications of anyone becoming a non-member; where allowed by law, you have no vote on proposed contracts or for union representatives, you personally cannot hold a union office or attend membership meetings, and you would lose benefits provided for you and any eligible dependents as provided by American Home Life.

Despite the letters, each plaintiff has resigned membership in Local 764.

Plaintiffs seek a declaratory judgment that Article IV of the CBA is invalid and that Local 764 violated its duty of fair representation by negotiating, maintaining, and enforcing Article IV of the CBA. Also, plaintiffs seek an order directing defendants to expunge Article IV from the CBA, an injunction barring defendants from negotiating, maintaining, or enforcing such a CBA provision in the future, and an order directing that defendants refund all union dues paid by plaintiffs subsequent to their resignations from Local 764.

III. VALIDITY OF ARTICLE IV

Before turning to the question of jurisdiction, we note that plaintiffs' claim as it relates to the validity of Article IV fails under Marquez v. Screen Actors Guild, Inc., 119 S. Ct. 292 (1998). In that case, the Supreme Court held that a union does not violate its duty of fair representation by negotiating a CBA containing a union security clause tracking the language of the NLRA. Prior decisions of the Court have established that "membership" in a union for such purposes is limited to paying fees and dues used for collective bargaining, contract administration, and grievance adjustment activities. 118 S. Ct. at 296. A unanimous Supreme Court held that the use of technical language in a CBA, i.e. language which does not explain this limitation, does not violate the duty of fair representation because it does not alter the substantive rights of the members of the bargaining unit and parties to a CBA are not bound to make the contract itself comprehensible to persons untrained in the law. 118 S. Ct. at 300-301.

Plaintiffs concede that their claim regarding the validity of the union security clause fails under Marquez. They add, however, that their claim challenging defendants' enforcement of the union security clause as a breach of the "implicit" terms of the CBA survives Marquez. Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss at 7. We turn, then, to the

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[2] "Union security clause' is the phrase used by the Supreme Court in Marquez; plaintiffs choose the phrase "forced unionism." See, e.g., Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss at 5. Like the plaintiffs' criticism of the Supreme Court, id. at 7, the use of a pejorative phrase does not raise the level of the debate.

question of whether we have subject matter jurisdiction over such a claim.

IV. JURISDICTION

In Communications Workers of America v. Beck, 487 U.S. 735 (1988), the Supreme Court summarized the principle governing jurisdiction over claims arising under the NLRA. When an activity is arguably subject to § 7 or § 8 of the NLRA, 28 U.S.C. §§ 157, 158, courts (both state and federal) must defer to the primary jurisdiction of the NLRB. Id. at 742. The court first must look at the challenged activity and determine whether it is defined or described within either of those sections; if so, the claim is subject to the section. See id. (union's activity of collecting fees for nonrepresentational purposes subject to § 8). In reaching this conclusion, the Court distinguished cases under the Railway Labor Act because no agency is established by that Act for the purpose of administering its provisions, and the two statutes do not parallel one another. Id. at 742-743.

However, a federal court may resolve questions that arise as collateral issues in suits brought under independent federal remedies, such as the duty of fair representation. Id. at 743. Jurisdiction over such claims encompasses challenges to a union's contract negotiation, administration, and enforcement efforts. Id. Still, employees may not circumvent NLRB jurisdiction by casting statutory claims as violations of the union's duty of fair representation. Id.

Succinctly stated for present purposes, if the activity of the defendants is one that is an "unfair labor practice" under either § 7 or § 8, the claim is properly a statutory claim to be presented

to the NLRB and this court would have jurisdiction only if the claim is collateral.

The relevant provisions of § 8 read:

> It shall be an unfair labor practice for an employer–
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...
>
> . . .
>
> It shall be an unfair labor practice for a labor organization or its agents–
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title...

NRLRA § 8 (a) (1), (3), (b) (1) (A) [29 U.S.C. § 158 (a) (1), (3), (b) (1) (A)].

Under these provisions, a violation of § 7 is an unfair labor practice, although that section does not itself state as much. It reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collec-

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[3] Sec. 8(a)(3) recites exceptions to the general rule recited which were relevant to the question of the validity of a union security clause and the language contained in such a clause as analyzed in Marquez. The exceptions are not relevant for present purposes and so are not quoted.

> tively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

NLRA § 7 [29 U.S.C. § 157].

Plaintiffs allege that defendants have attempted to force or coerce them into remaining members of the union as a condition of employment. This activity plainly falls within the definition of "unfair labor practice" under § 7 and § 8. Denominating the activity as a breach of the duty of fair representation does not alter its fundamental nature, and plaintiffs may not circumvent the primary jurisdiction of the NLRB in this way. Moreover, the claims are not collateral to any claim over which this court has jurisdiction; they are the only claims.

We conclude that we lack subject matter jurisdiction, and the remaining portion of the complaint will be dismissed pursuant to Fed. R. Civ. P. 12 (b) (1).

V. CONCLUSION

Plaintiffs' claim relating to the validity of the union security clause is subject to dismissal under Fed. R. Civ. P. 12 (b) (6) as barred by Marquez. The court lacks subject matter jurisdiction over plaintiffs' remaining claim, and that portion of the complaint will be dismissed under Fed. R. Civ. P. 12 (b) (1).

An order consistent with this memorandum will issue.

/s/
James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERIC BUCKLEY, et al.,	:	
Plaintiffs	:	No. 4:CV-98-0270
	:	(Judge McClure)
v.	:	
	:	
PHILIPS INDUSTRIES, INC.,	:	**[DATE STAMP**
d/b/a PHILIPS PRODUCTS,	:	**OMITTED IN**
SELINS-GROVE, et al.,	:	**PRINTING]**
Defendants	:	

ORDER

April 15, 1999

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. The motion (record document no. 18) to dismiss filed by defendant Teamsters Local Union No. 764, International Brotherhood of Teamsters, AFL-CIO-CLC, is granted.

2. The motion (record document no. 19) to dismiss filed by defendant Philips Industries, Inc., d/b/a Philips Products, Selinsgrove, is granted.

3. Plaintiffs' claim that the union security clause is invalid, and the related claim concerning negotiation of the union security clause, is dismissed under Fed. R. Civ. P. 12 (b) (6).

4. Plaintiffs' claim relating to the alleged attempts to enforce the union security clause is dismissed under Fed. R. Civ. P. 12 (b) (1).

5. The clerk is directed to close the file.

/s/
James F. McClure, Jr.
United States District Judge

APPENDIX C

ORDER ON SUR PETITION FOR REHEARING UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

25 April 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3340

ERIC BUCKLEY; DAVID W. MOWRY; DALE C. RATHFON, JR.; DAVID A. REICHENBACH; DENNIS L. REICHENBACH; JACOB WEAVER; DUANE L. WHITE; SANDRA L. WHITE,

Appellants

v.

PHILIPS INDUSTRIES, INC., d/b/a Philips Products, Selinsgrove; TEAMSTERS LOCAL UNION NO. 764, International Brotherhood of Teamsters, AFL-CIO-CLC

(D.C. Civ. No. 98-cv-00270)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,

SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, ALDISERT* and COWEN*, Circuit Judges

The Petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit court judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/
Circuit Judge

Dated: Apr 25 2000

* As to panel hearing only.

APPENDIX D

UNITED STATES CONSTITUTION
Article III

UNITED STATES CONSTITUTION
Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . . .

APPENDIX E

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 158 (a)(3)

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 158 (a)(3)

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . .

APPENDIX F

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 159 (a)

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 159 (a)

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

APPENDIX G

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 185 (a)

NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 185 (a)

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.